SUPREME COURT U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 199

Docket No. 1927 (Vermont)

WILFRED R. WHEELER,

Appellant,

—v.—

STATE OF VERMONT.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

Docket No. 42-69 (Vermont)

WILFRED R. WHEELER,

Appellant,

—v.—

STATE OF VERMONT.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

MOTION TO DISMISS OR AFFIRM

STATE OF VERMONT.

by MESSRS. PATERSON, GIBSON,
NOBLE AND BROWNELL

Jonathan N. Brownell, Esq.
Counsel for the Appellee

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MOTION TO DISMISS OR AFFIRM

Appellee, in the above-entitled cases moves to dismiss the appeal, or to affirm the final judgments of the Supreme Court of the State of Vermont on the ground that the appeal does not present a substantial Federal question and that the questions are so insubstantial as not to warrant further argument.

Opinions Below

The opinions of the Supreme Court of Vermont reported at 127 Vt. ——, 249 A.2d 887 (1969) and 127 Vt. ——, 253 A.2d 136 (1969), are printed in Appendices A and B of the Jurisdictional Statement.

Question Presented

Whether the Constitution of the United States bars a State from imposing a graduated income tax on nonresidents which, for the purpose of applying the graduated rates to which residents are subject, takes into account the nonresident's total net income from all sources (after allowing for pro-rated personal type deductions and exemptions), and then reduces the tax by the ratio of in-state income to total income?

Statute in Question

The pertinent provisions of the Vermont Income Tax Law (Tit. 32, chs. 151-152), are set forth in Appendix C of the Jurisdictional Statement.

Statement

Under the Vermont income tax, residents are taxable on all income from whatever source derived, but nonresidents are taxed only on income derived from sources within the State. Prior to 1968, Vermont applied its graduated income tax rates directly to income from sources within the State. (32 V.S.A. Chapter 151). However, this

method necessarily placed nonresidents in lower brackets than residents with comparable incomes, the Legislature in 1965 and 1967 adopted the statutes now under attack, which are designed to apply the State's graduated rate schedule equally to residents and nonresidents.

The method employed by Vermont statute, under both the 1966 law and the 1967 law, to accomplish this result is as follows:

> (1) A tentative tax is computed on the nonresident's total income just as if he were a resident, giving him the same deductions and exemptions as a resident is allowed.
>
> (2) The tentative tax is then reduced to the ratio of the nonresident's Vermont adjusted gross income to his total adjusted gross income and this is the tax he pays.*

By this method only income derived from Vermont sources is taxed, and the taxpayer receives his pro rata portion of all deductions, business and non-business, and exemptions allowed residents.

Appellant, who resides in New Hampshire, is a salesman for Ward's Foods, Inc., and he solicits orders from retail stores in both New Hampshire and Vermont. Under the 1966 Vermont statute, Appellant's income tax liability for 1966, as shown in his return was as follows:

* Adjusted gross income is defined in substantially the same way as that term is used for purposes of the Federal income tax (Sec. 62, Int. Rev. Code). The term means gross income, less trade and business expenses and designated expenses of employees. No objection has been raised by the Appellant to the use of adjusted gross income for this purpose, his objection is the more basic one set out in the text.

Total adjusted gross income	$7,714.47
Less full deductions and exemptions	2,771.45
Net Income	$4,943.02
Tentative Tax (the amount which would be payable by a Vermont resident)	$ 216.88
Ratio of Vermont income to total adjusted gross income $1,928.62 / $7,714.47 = 25%	
Tax liability of Appellant, determined by applying the 25% ratio to the amount of tentative tax	$ 54.15

After filing his return under protest and paying the tax, Appellant filed a claim for refund, contending that Vermont exceeded its constitutional power in enforcing the tax. He contends that Vermont is required to determine his tax by taking into account only his Vermont income, allowing him pro-rata personal deductions and exemptions, as follows:

Vermont income	$1,928.62
Ratio of Vermont income to total adjusted gross income $1,928.62 / $7,714.47 = 25%	
Less pro-rated personal deductions and exemptions, or 25% of $2,771.45	692.86
Net Income	$1,235.76
Vermont Tax	$ 54.15

Under the method of determining his Vermont tax that Appellant contends is mandated by the Federal Constitution,

tion, he would pay approximately half the tax imposed by the statute, because, taking only his Vermont income into account in determining the tax rate, the Appellant would have been subject only to the State's first brackets—1% on the first $1,000 and 4% under the remaining $235.76, whereas under the statutory method, his rate of tax is determined by his total net income of some $3,000 and reaches higher brackets. The same effective result obtains under the 1967 Vermont statute, also under attack here, which adopted the Federal progressive rate in place of the 1966 rate table.

There can be no contention that Vermont is taxing Appellant on an out-of-state income, inasmuch as Vermont's income tax rate is applied exclusively to his Vermont derived income. Appellant does contend that Vermont is required by the Federal Constitution to take into account, in fixing its rates of tax on the income of a nonresident, only his income from sources within the State.

The Supreme Court of Vermont rejected the Appellant's contentions that the tax violates the Due Process of Law Clause, the Privileges and Immunities Clause of Article 4, Section 2, and the Equal Protection of the Laws Clause of the Federal Constitution.

This motion is made by the Appellee, State of Vermont, because the holding below by the Supreme Court of that State is grounded on well-established constitutional principles, which do not warrant review by this Court.

ARGUMENT

I.

The Due Process Clause is not violated by taking out-of-state income into account solely to determine tax rates.

Appellant complains that to take out of state income into account in order to measure the rate of tax to be applied from in-state sources violates the Due Process Clause of the Fourteenth Amendment, in that it constitutes extra-territorial taxation. Fifty years ago essentially the same contention was rejected by this Court in *Maxwell v. Bugbee* (250 U.S. 525 (1919)), where the same method was used to determine the rate of inheritance tax on the estate of a non-resident. In that case, the State of New Jersey, in order to apply its graduated inheritance rate tax structure to non-residents, determined the inheritance tax rates applicable to a non-resident estate by computing the tax on the entire estate, $1,000,000 of which was admittedly non-taxable by the State, and thereafter by reducing the tentative tax thus determined by the ratio of out-of-state to in-state assets. Mr. Justice Pitney stated the taxpayer's contention as follows:

> "It is next contended that the [tax] so calculated [by reference to property beyond the jurisdiction of the State] is unreasonable and arbitrary, and amounts to a deprivation of property without due process of law because it in effect taxes property beyond the jurisdiction of the State." (250 U.S. at p. 539; our emphasis)

The Court, four Justices dissenting, rejected the argument declaring:

> "In the present case the State imposes a privilege tax, clearly within its authority, and it has adopted as a measure of that tax the proportion which the specified local property bears to the entire estate of the decedent. That it may do so within limitations which do not really make the tax one upon property beyond its jurisdiction, the decisions to which we have referred clearly establish. The transfer of certain property within the State is taxed by a rule which considers the entire estate in arriving at the amount of the tax. It is in no just sense a tax upon the foreign property, real or personal. It is only in instances where the State exceeds its authority in imposing a tax upon a subject matter within its jurisdiction in such a way as to really amount to taxing that which is beyond its authority, that such exercise of power by the State is held void. In cases of that character the attempted taxation must fail. Looney v. Crane Co., 245 U. S. 178; International Paper Co. v. Massachusetts, 246 U. S. 135. To say that to apply a different rule regulating succession to resident and non-resident decedents is to levy a tax upon foreign estates, is to distort the statute from its purpose to tax the privilege, which the statute has created, into a property tax, and is unwarranted by any purpose or effect of the enactment, as we view it." (Pp. 539-540).

This method of taxing inheritances and decedent's estates has become a characteristic feature of death taxes in a number of States in the fifty years since *Magoun v. Illinois Trust* was decided.[7]

[7] Alabama: Ala. Code (Recomp. 1958) ; Arkansas: Ark. Stat. (1947) tit. 84 (1960 Supp.); Florida: Fla. Stat. (1959) c. 198 (1960 Supp.); Georgia: Ga. Stat. Ann. (1936) tit. 92 (1962 Supp.); Kentucky: Ky. Rev. Stat. (1962) c. 140; New Jersey: N.J. Rev. Stat. (1937) 54:33-1; New York: N.Y. Tax Law (1960); Pennsylvania: Pa. Stat. Ann. (1962 Supp.); South Carolina: S.C. Code (1962) tit. 65 (1962 Supp.); South Carolina: S.C. Code (1962) tit. 65 (1962 Supp.).

The principle that out-of-state property may be taken into account in fixing the rate of tax, so long as the tax measure is limited to property or activities within the State, has since been applied in sustaining state chain store taxes. In *Great Atlantic & Pacific Tea Co. v. Grosjean* (301 U.S. 412 [1937]), A&P attacked a Louisiana license tax under which the rate of tax per store varied with the number of stores in the chain, both within and without Louisiana. This Court, citing *Maxwell v. Bugbee*, *supra*, rejected the contention that the Due Process Clause was violated, because out-of-state factors were considered in fixing the rate of tax.

Consequently, for half a century, the principle has been established in this Court that so long as a State is taxing only property or other tax measures within its jurisdiction — as to which there is no controversy in this case — there is no constitutional prohibition against taking out-of-state factors into account in determining the effective rate of tax.

II.

Since the use of out-of-state income to fix tax rates is designed to apply the State's graduated income tax rates to residents and non-residents alike, there is no violation of the Privileges and Immunities Clause.

There is no substance to the Appellant's contention that the Privileges and Immunities Clause of Article 4, Section 2 is violated by the Vermont tax. Appellant's argument that he is discriminated against is based on the premise that Vermont must treat him, for rate purposes, as a taxpayer with an income of approximately $1,250, the amount of his Vermont net income (after pro rating all deductions and exemptions), because a Vermont resident with a $1,250

net income would pay only roughly $25, whereas his tax has been determined to be about $50. The asserted discrimination lies in the determination of the Vermont Legislature that the Appellant is to be treated solely for rate purpose, as earning net income not of $1,250, but his actual net income from all sources of $5,000.

The standard established by this Court for determining whether a non resident has been denied the Privileges and Immunities safeguarded by Article 4, Section 2 of the Constitution is whether a State has worked discrimination against the non resident with respect to which no "reasonable ground for diversity of treatment exists." *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 78 (1920); *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). At first blush, *Maxwell v. Bugbee*, the inheritance tax case cited above, would appear to dispose summarily of Appellant's contention in this case, for the Court there held that the Privileges and Immunities Clause does not bar a State, in applying its inheritance tax, from taking his entire estate into account. What New Jersey did in inheritance taxation is essentially what Vermont has done in the case at bar in income taxation. However, we desire to call the Court's attention to the fact that the Privileges and Immunities Clause objection in *Maxwell v. Bugbee* appears to have been rejected in that case, in part at least, on a ground that the Court has since repudiated. The New Jersey inheritance tax statute was drawn in terms of taxation of estates of "non residents", not in terms of decedents who were not "citizens" of the State. In passing on this issue, the Court declared:

> "The alleged discrimination, here complained of, so far as privileges and immunities of citizenship are concerned, is not strictly applicable to this statute because the 'difference' in the method of taxation rests upon residence and not upon citizenship." (250 U.S. at pp. 538, 539.)

Later decisions of the Court dealing with state taxation have held that, although the Privileges and Immunities Clause speaks of "citizens" and not "residents", a general taxing scheme "if it discriminates against all non-residents, has the necessary effect of including in the discrimination those who are citizens of other States". *Travis* v. *Yale & Towne Manufacturing Co.*, 252 U.S. at p. 79; *accord*: *Toomer* v. *Witsell, supra.* Consequently, the authority of the *Maxwell* case is open to question in respect to the Privileges and Immunities Clause issue.

We accordingly turn to other tax cases arising under the Privileges and Immunities Clause that do not rely on the distinction between "non-residents" and "non-citizens". The Court has held that complete denial to non-residents of personal exemptions granted to residents violates the Privileges and Immunities Clause, (*Travis* v. *Yale & Towne Manufacturing Co.*, 252 U.S. 60 [1920]), but that under the clause non-residents may be limited in losses allowable as offsets against income tax to those incurred within the State. (*Shaffer* v. *Carter*, 252 U.S. 37 [1920]). Likewise, since the States tax non-residents only on income from sources within the state, the Court has held that there is a reasonable basis for denying non-residents personal type deductions, such as real estate taxes on a residence, and interest on personal obligations, although such deductions are allowed residents. (*Travis* v. *Yale & Towne Manufacturing Co., supra;* see also matter of *Goodwin* v. *State Tax Commission*, 286 App.Div. 694, 146 N.Y.S.2d 172 (3rd Dep't 1955) aff'd 1 N.Y.2d 680, 133 N.E.2d 711 (1956), appeal dismissed for want of a substantial federal question (352 U.S. 805 [1956]).

The Vermont tax readily satisfies the constitutional requirement that its method of taxing non-residents rest on

"reasonable grounds".* It rests on the Legislative objective to apply the principle of taxation according to ability to pay, embodied in its graduated rate schedule adopted in the income tax law, to residents and non-residents alike. This principle is the distinctive feature of income taxation in the United States, and in many foreign countries. There are now 42 States and local governments in this country that levy graduated personal income taxes.

What possible offense to the Privileges and Immunities Clause can be found in the extension of the ability to pay principle to non-residents? Certainly, not that non-residents are treated less advantageously than residents, for both are subjected to the progressive tax rates. Indeed, it was precisely to achieve equality between non-residents and residents that the 1965 amendment to the Vermont tax here in controversy was adopted, for prior thereto only residents were subjected to tax rates determined by their total incomes, but non-residents were taxed at rates measured only by their in-state incomes.

To illustrate from the facts in this case, if the Appellant were a resident of this State, he would pay a Vermont income tax of approximately $200, based on taxable income of roughly $5,000 from all sources, after allowance for his deductions and personal exemptions. This is an

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* That Vermont's levy is not hostile towards non-residents is also reflected in the operation of the statute, which grants non-residents personal type deductions that it could constitutionally deny them, i.e., a pro-rata portion of real estate taxes paid on the non-resident's home, interest on his home mortgage and the like. See *Travis* v. *Yale & Towne Manufacturing Co., supra; Matter of Goodwin* v. *State Tax Commission*, 286 App.Div. 694, 146 N.Y.S.2d 172 (3rd Dep't 1955), aff'd 1 N.Y.2d 680, 133 N.E. 711 (1956), appeal dismissed for want of a substantial Federal question, 352 U.S. 805 (1956).

effective rate of 4% applied to each dollar of his taxable income. As a non-resident who earned only 25% of his total taxable income for the year in Vermont, this same effective rate is applied to the one-fourth of his taxable income earned in this State, so that he is subject to a tax of approximately $50. In this way, the graduated rate feature is applied to both residents and non-residents, limited in the non-resident's case to his income from sources within the State, at the same 4% effective rate.

But if, as the Appellant claims, the Federal Constitution compels the State to consider only his Vermont income in determining not only his income subject to tax, but also his tax rate, he would pay only about $25 on his Vermont based income, or at an effective rate of approximately 2% on the one-fourth of his taxable income derived from services rendered in the State.

If the method used by the State of Vermont should be held to be proscribed to the States by constitutional restrictions, a taxpayer doing business in or deriving income from more than one State, would escape the impact of graduated income taxation at the rates imposed by such States. Accordingly, we submit that there is no merit to the Appellant's contention that the extension of the ability to pay principle to non-residents is not a "reasonable ground" for the tax at issue. The "reasonable ground" which eminently justifies the levy under this clause of the Constitution is nothing less than the principle of progressive income taxation.

III.

The application of Vermont's graduated income tax rates to non-residents is based on a reasonable policy and does not deny the non-resident the equal protection of the laws.

The Appellant's final attack on the constitutionality of the denial of his claim for refund of the State income tax is that the levy violates the Equal Protection Clause of the Fourteenth Amendment.

This Court has repeatedly applied the principle that if a "classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of equal protection of the law." (*Brown-Forman Co.* v. *Commonwealth of Kentucky,* 217 U.S. 563, 573 [1910]; *State Board of Tax Commissioners of Indiana* v. *Jackson,* 283 U.S. 527, 537 [1931].)

Within this guiding principle, the Court has held with respect to taxation:

> "The State may tax real and personal property in a different manner. It may grant exemptions * * *. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. In levying such taxes, the State is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value." (*Ohio Oil Co.* v. *Conway,* 281 U.S. 146, 159 [1930].)

The Court has rejected claims of non-residents in a number of the cases discussed above (see Point I) that diversity of tax treatment between non-residents and residents

infringes their right to Equal Protection of the Laws. Thus, the language of the Court in *Maxwell* v. *Bugbee* is applicable to the case at bar:

> "Equal protection of the laws requires equal operation of the laws upon all persons in like circumstances. Under the statute, in the present case, the graduated taxes are levied equally upon all interests passing from non-resident testators or intestates. * * *
>
> "In order to invalidate this tax it must be held that the difference in the manner of assessing transmission of property by testators or intestates, as between resident and non-resident decedents, is so wholly arbitrary and unreasonable as to be beyond the legitimate authority of the State. We are not prepared so to declare. The resident testator or intestate stands in a different relation to the State than does the non-resident. The resident's property is usually within the ready control of the State * * *. As to the resident, his entire intangible, and usually most of his tangible property, pay tribute to the State when transferred by will or intestacy [whereas the taxable estate of the non-resident is more restricted]". (250 U.S. at pp. 541-542.)

In applying these principles of Equal Protection to the instant case, at the outset we press the point that the Vermont State income tax does not discriminate against non-residents. It gives them more advantageous treatment than residents, and is more generous in its allowance of exemptions and deductions than is constitutionally mandated (see Point II, *supra*). But regardless as to how the diversity of residents and non-residents be viewed in this case, there is no denial of Equal Protection. Surely, there is nothing "capricious" or "arbitrary" in seeking to apply the principle of taxation according to ability to pay to non-resi-

dents, along with residents. This policy fully satisfies the long standing Equal Protection test that "a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it." (*New York Rapid Transit Corp.* v. *City of New York,* 303 U.S. 573, 578 [1938].)

Nor can the Appellant prevail in his contention that the method of taxing non-residents employed by some other States, under which his tax rate would be determined by reference only to his Vermont source income, with a pro-rating of deductions and exemptions, should be used in this State. It is the prerogative and responsibility of the Vermont General Assembly to determine how non-residents should be taxed.

> "The States have a very wide discretion in the laying of their taxes * * * [The Equal Protection Clause] imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation." *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522, 526 [1959].

We submit that the determination and design by the Vermont General Assembly of a levy structured so as to apply progressive income taxation to non-residents, as well as to residents—a principle upheld by this Court and woven into the fabric of the tax systems of most of the developed countries of the world—are not repugnant to the Equal Protection Clause.

Prayer for Relief

We respectfully submit, therefore, that the appeal does not present a substantial Federal question and that the questions are so insubstantial as not to warrant further argument. Accordingly, we respectfully request the Court to dismiss this appeal or to affirm the judgment of the Supreme Court of Vermont.

Respectfully submitted,

STATE OF VERMONT

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Date: July 3, 1969